IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3463 OF 1991

Mukund Shrivastava ....Petitioner

V/s.

The Chief Executive Officer
Maharashtra Housing & Area
Development Authority, Bombay & Ors. ....Respondents

Mr.J.P. Cama i/b Mr.K.P. Anilkumar for the Petitioner.

Ms.Geeta Shastri, A.G.P. for the Respondents.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 25TH FEBRUARY, 2005.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

1. The Petitioner seeks a writ of Mandamus to set-aside the promotion of Respondent Nos.4 to 12 from the post of Junior Engineer to the post of Deputy Engineer in supersession to the Petitioner, to direct Respondent Nos.1 to 3 to promote the Petitioner to the rank and post of the Deputy Engineer on and from July, 1991 and to restrain Respondent Nos.1 to 3 from promoting the Petitioner's juniors to the said post of Deputy Engineer.

2. Respondent No.1 is the Maharashtra Housing and Area Development Authority, Bombay. Respondent Nos.2 and 3 are the Chief Officer and Deputy Engineer of Respondent No.1 respectively.

3. The Petitioner, a graduate Engineer, joined the services of Respondent No.1 on 6th April, 1981 as a Junior Engineer on probation of one year. He was posted to the office of the Executive Engineer, redesignated as an Assistant Engineer with effect from 6th April, 1981 by an order dated 18th February, 1987 and placed under the appropriate revised pay scale. According to the Petitioner though he was re-designated as an Assistant Engineer, he was addressed by the Respondent as, Junior Engineer. The Petitioner was thereafter transferred and posted to the office of the Executive Engineer of the third Respondent.

4. The Petitioner’s case is that though he worked honestly and diligently, he was not made permanent and that he was harassed by the officers of Respondent No.1 who continuously issued various memos finding fault with his work. The Petitioner states that a series of memos containing allegations and

threats of disciplinary action were issued to him. For the purpose of this Petitioner, it is not necessary to consider these allegations. The refusal to promote the Petitioner is supported on the basis of certain circulars which we shall shortly refer to.

5. On 11th October, 1989, Respondent No.1 prepared a promotion/seniority list of the Junior Engineers for the purpose of promotion to the post of Deputy Engineer. Fifteen candidates were selected for promotion. The Petitioner's claim for promotion was however disregarded. Though he was admittedly senior and allegedly held a higher qualification i.e. a degree in Civil Engineering as opposed to a diploma, the Petitioner was superseded by his juniors. The Petitioner made representation against the same.

6. Thereafter on 3rd July, 1990, the Respondents published a seniority list of graduates who are diploma holders and holders of certificate of completion of the course in Architecture. The Petitioner was shown at serial No.2 therein. The aforesaid order was circulated amongst the various authorities. The Petitioner has alleged that despite the same, on 9th July, 1991, a promotion order is issued by the first Respondent by which twenty

employees were promoted to the post of Deputy Engineer. The Petitioner however was not promoted to the said post. Respondent Nos. 4 to 12 are also graduate Engineers. All of them are junior to the Petitioner. The seniority list published on 3rd July, 1990 was on the basis of the date of joining and qualifications of the employees.

7. The Petitioner filed the above Petition on 22nd November, 1991 alleging that the Respondents had decided once again to promote the employees whose names were shown in the seniority list dated 3rd July, 1990 and that his name was once again not considered for promotion.

8. The Petitioner’s case is that he is senior to Respondent Nos.4 to 12 and that the promotion to the said post of Deputy Engineer was to be purely on the basis of seniority-cum-merit and that therefore in the absence of any adverse remarks against him, he was entitled to be promoted before all those who were junior to him.

9. The Petitioner’s claim for consideration for promotion is not sustainable. It is based on an incorrect presumption that the post is purely on

seniority-cum-merit in the sense that once it is determined that the Petitioner is senior to his colleagues, he is bound to be promoted irrespective of all other facts and circumstances of the case so long as there was nothing adverse against him.

10. Ms.Shastri, the learned A.G.P. appearing for Respondent Nos.1 to 3 invited our attention to the guidelines dated 16th May, 1988 issued by Respondent No.1 for promotion from Class-III to Class-II. The relevant part thereof reads as under :-

> **PROMOTION FROM CLASS III TO CLASS-II**
>
> 1. Promotion from Senior Assistant Cadre to Superintendent/Assistant Estate Manager :- Out of last five confidential reports not a single shall be of "C" level. If there be B (-) for more than one there must be B (+) and remaining three reports shall be of B or upper level.
>
> Promotion in the cadre of Estate Manager :- Out of last five confidential reports not a single should be C or B (+) level. If there be a B (-) one must be B (+) and remaining four shall be of B or above level."

11. Admittedly the Petitioner did not fulfil the eligibility criteria specified in the said circular. It is true that in the affidavit in reply filed by Respondent No.1, it is contended that the Petitioner was not considered fit for promotion by the Selection

Committee due to his unsatisfactory confidential reports as well. We ignore this aspect for the purpose of this order. The fact however remains that the Petitioner's case did not meet the minimum qualifications prescribed by the aforesaid circular dated 16th May, 1988.

12. In a further affidavit filed by Respondent No.1, it is stated that the circular dated 16th May, 1988 in fact adopts the Government Resolution issued on 7th July, 1977. This was because Respondent No.1 was set up on 5th December, 1989.

13. It appears that in 1989, Respondent No.1 had also decided to give marks to the grading given in the confidential report while giving promotion. This was done to avoid various discrepancies emanating due to acceptance of different criteria by different Committees to decide the eligibility for promotion. In the circumstances, a circular dated 20th November, 1989 was issued. The circular was based on another Government Resolution of the General Administrative Department dated 9th September, 1988. The promotions given in 1991 were based on the said circular dated 20th November, 1989. The relevant part of the said circular dated 20th November, 1989 reads as under :-

"CIRCULAR :

. While giving promotions to officers / employees in the Authority's offices, in various cadres, confidential reports of the officers / employees completing the requisite period necessary for promotion for the period preceding five years along with the C.R. for the relevant period are being placed before the Selection Committee for examination. On scrutiny of confidential reports, gradations of the C.R.s are determined as per the Govt. Resolution, General Administration Dept. No. ESB / CPR / 1085 / 868 / Thirteen / dated 9/09/1988, Government has decided the gradations of confidential reports as under :

1. (Outstanding : (A+))

2. (Very Good : (A))

3. (Positively Good: (B+))

4. (Good : (B))

5. (Average : (B-))

6. (Below Average : (C))

2. After deciding gradations of confidential reports, as per the above Govt. Resolution, the decisions with regard to promotions of officers / employees in Technical / Non-technical cadres of the Authority were being taken by different selection committees appointed for granting promotions. In order to avoiding discrepancies emanated due to accepting different criteria by different committees in the matter of deciding eligibility for promotions, criteria were fixed for various cadres of promotions by the orders and circulars under

reference.

3. The selection Committee, appointed for giving promotions to Officers in Technical Cadres of the Authority, while considering the confidential reports, placed before it, for promotion in its meeting held on 20/04/1989, considered first,the criteria fixed earlier and recommended that hereafter the criteria fixed by the Authority earlier for various cadres being very stringent should be relaxed and the procedure of awarding marks, based on gradation of confidential reports should be adopted. According to that recommendation, following amended criteria are being decided for giving promotions to employees and officers in different cadres. Hence forward while giving promotions to officers/employees in various categories, the following amended criteria based on 25 marks, should be the basis for taking decision relating to eligibility for promotions, or otherwise.

The amended Mark-based criteria proposed for promotion

(A+,	A,	B+,	B,	B-,	C)
(					)
(5	4	3	2	1	0)

(2) Promotion from Class III to Class II :

1) Promotion from the cadre of Senior Asstt. to the cadre of Superintendent/Asstt.Estate Manager.

A) If none of the confidential reports, out of the C.Rs. of the proceeding five years is of ‘C’ grade then 9 (nine) marks to become eligible for promotion will be essential, otherwise 11 (eleven)

marks will be essential.

NOTE :

1) The above criteria are proposed for promotion in clerical cadres. The very same criteria are proposed for promotion in other cadres viz. Accounts, Legal & Technical cadres, but while applying the above criteria the criteria of the post in the similar pay scale be applied."

14. The Petitioner falls in the technical cadre. There is no dispute about the fact that as per the aforesaid circular the Petitioner was not eligible for promotion as he did not meet the requirements specified therein.

15. Mr.Cama however contended that the post was purely on the basis of seniority-cum-merit. He invited our attention to various judgments in respect of the proposition that in non-selection posts/posts to be filled in purely on the basis of seniority-cum-merit, the senior most employee is bound to be promoted unless he has been declared unfit for holding the post in question.

16. These judgments do not assist Mr.Cama. In none of the cases was there any question of a minimum eligibility criteria being specified by the employer. In *The State of Mysore v. M.H. Bellary AIR 1965*

Supreme Court 868, the Supreme Court construed Rule 50(b) and held that the service of an officer on deputation in another department is treated by the rule as equivalent to service in the parent department and that it is this equation between the services in the two departments that forms the basis of the said rule. In this context the Supreme Court held that so long therefore as the service of the employee in the new department is satisfactory and he was obtaining the increments and promotions in that department, it stands to reason that that satisfactory service, and the manner of its discharge in the post he actually fills, should be deemed to be rendered in the parent department also so as to entitle him to promotions which are based on seniority-cum-merit basis. The rules in that case did not provide any other criteria on the basis whereof it was held that the Petitioner was not eligible to be considered for promotion as in the case before us.

17. In *Hari Singh Verma v. Union of India & Ors. High Court, L.L.J. Bombay 1987*, S.P. Bharucha, J. (as His Lordship then was) was concerned with Rule 212, in Chapter II of the Indian Railway Establishment Manual dealing with promotions in non-selection posts. The Rule provides that non-selection posts could be

filled in by promotion of the senior most suitable railway servant, suitability being determined by the authority competent to fill the post on the basis of the record of service and/or departmental tests if necessary. It was held that a senior employee may be passed over only if he has been declared unfit for holding the post in question. A declaration of unfitness should, ordinarily, have been made some time previous to the time the promotion of the railway servant was being considered. It was held on facts that there were no adverse remarks in respect of certain confidential reports and that adverse remarks, if any, in respect of other confidential reports were not communicated to the employee. It is in these circumstances that the employers failure to consider the employee for promotion was set aside. Here again there was no other eligibility criteria stipulated for an employee to be considered for promotion.

18. In *Gajanan Jairamsa Andhare v. The Commissioner General, Home Guards & Ors. CLR H.C. 625*, a Division Bench of this Court held that it is well settled that when the criteria is of seniority-cum-merit unless it is found that the Petitioner was unfit, he could not have been superseded in promotion. The question that arose

before us did not arise in this case either.

19. In *Union of India v. Virpal Singh Chauhan etc. 1995 II CLR 1109,* the Supreme Court held in paragraph 19 as under :-

> "19. Pausing here for a moment, we must explain what does panel mean and signify in the case of promotions. Though we enquired repeatedly, this aspect could not be clarified by the learned Additional Solicitor General. In particular, we wanted to know whether a panel is prepared only in the case of selection posts or is it also prepared in the case of non-selection posts. The several instructions in Indian Railway Establishment Manual are also not helpful on this aspect. We are, therefore, left to interpret the expression ourselves. Having regard to the fact that in all the above circulars/letters, the expression "panel" has been used to denote a merit list or select list, as it may be called, we think it reasonable to understand as a panel which is prepared in the case of selection posts only. In the case of non-selection posts, there is no question of such a panel. In their case,the senior is promoted automatically unless he is found to be unsuitable to hold the promotion post. No panel, i.e. merit list or select list is called for in the case of non-selection posts. May be, ultimately, a list of persons to be promoted is prepared but that is neither a merit list, nor a select list."

20. It is true that the expression

seniority-cum-merit has been used in the present case. Mere nomenclature however, is not conclusive of the issue as to whether the promotion is based solely on seniority-cum-merit or whether there are other aspects to be taken into consideration while considering whether an employee is eligible for promotion. In the present case the circular specifically required an employee to fulfil certain minimum criteria before being considered for promotion.

21. Mr.Cama did not invite our attention to any authority in support of his submission that a minimum eligibility criteria cannot be stipulated where promotions are on seniority-cum-merit basis. In our view, it is always open even in respect of promotions on seniority-cum-merit basis to specify a minimum eligibility criteria for employees being considered for promotions.

22. It is also pertinent to note that the Petitioner has not challenged the validity of the aforesaid circulars. In the circumstances, we are not inclined to accept the challenge to the promotion of the said Respondents.

23. Mr.Cama then invited our attention to the

judgment of the Supreme Court in *Col.A.S. Sangwan v. Union of India & Ors. 1981 LAB.I.C. 831*, where it was held that whatever policy is made subsequently should be done fairly and made known to those concerned. Mr.Cama submitted that the policy contained in the aforesaid circulars were not made known to the Petitioner. We are unable to accept this contention. The affidavit in reply filed on behalf of Respondent No.1 expressly stated that the said circulars were widely circulated by the regional department of Respondent No.1. There is nothing to suggest that what is stated by Respondent No.1 is not correct. It is not possible to accept the Petitioner’s contention.

24. In these circumstances, the Petition is dismissed. There shall be no order as to costs.

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WRIT PETITION NO.3463 OF 1991

DATE OF DECISION : 25TH FEBRUARY, 2005

For Approval and Signature :

HON'BLE MR.JUSTICE A.P. SHAH

HON'BLE MR.JUSTICE S.J. VAZIFDAR

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)